United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

252

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,519

CLIFFORD E. GREEN,

Appellant,

v.

UNITED STATES OF AMERICA

Appellee

Appeal from the United States District Court
For the District of Columbia

JOHN F. DOYLE Esquire

c/o Office of General Counsel
National Catholic Welfare Conference
1312 Massachusetts Avenue, N. W.
Washington, D. C. 20005

Attorney Appointed to
Appellant Clifford E. Green.

QUESTIONS PRESENTED

1. Whether the Court committed plain error in permitting the prosecutor to impeach defendant by inquiry respecting a prior conviction for assault.

2. Whether the Court committed plain error in permitting the prosecutor to impeach a witness for the defense by inquiry respecting her chastity.

3. Whether the conviction of defendant on Count One of the indictment was against the weight of the evidence.

4. Whether the Court committed plain error by failing to instruct the jury that proof of identity in respect of one offense of the two offenses charged could not be used as circumstantial evidence of identity in respect of the other offense charged.

INDEX

TABLE OF AUTHORITIES

Cases:

Page

Cases (continued)

STATEMENT OF THE CASE

This is an appeal from the judgment of conviction of defendant, Clifford E. Green, after verdict of guilty of the offenses of robbery and assault with intent to commit robbery (2 counts) in violation of 22 D. C. Code, Sections 2901 and 501.

The robbery occurred on the night of November 25, 1966 and is based upon the testimony of a cab driver, Gordon J. Stiles (Tr. 14 et seq). There was no testimony contradicting that of Mr. Stiles to the effect that he was robbed by two men. The defendant denied that he had robbed Mr. Stiles (Tr. 67) and testified that to the contrary, he on the night in question was chaperone at a party given by his sister for her son and nephew (Tr. 68). The testimony was corroborated by the testimony of his sister, Iola Elaine Green, to the same effect (Tr. 80 et seq). Stiles identified defendant as one of the two men who had robbed him (Tr. 17, 18) but his opportunities for perception during this night time were conceded by him to be limited to two occasions; once when after being hailed by two men on top of the bridge on Minnesota Avenue and South Capitol Street (Tr. 15, 16) he pulled by them and then observed them as they were coming toward him and he was backing his cab (Tr. 17) and again when he turned around and was struck suddenly by one of the men who was concededly not Green (Tr. 16, 17, 25) with a pistol.

The assault with intent to commit robbery is based essentially upon the testimony of a cab driver, Charles C. Hines (Tr. 30 et seq). The crime took place again at night, i.e., shortly after midnight on the morning of November 27, 1966, and two men were involved. There is again no evidence contradictory to the fact of the assault. The defendant denies complicity

and testified that he had been to a party at a friend's house and was on his way walking home when arrested at 18th and D Streets, N. E. (Tr. 68, 69, 70) He testified that he had tried to find the witness who could corroborate the alibi, his host at the party, but could not do so since the host had moved (Tr. 75, 76, 77). The cab driver identifies the defendant from observations when defendant got in the cab, when the driver turned around while driving to pass a cigarette (Tr. 33, 34) and when the man identified as defendant allegedly was putting a handkerchief over his face (Tr. 35) and another unspecified occasion (Tr. 42). The actual striking committed by the one of the two men who concededly was not Green occurred at 18th and D Streets. The driver got out of his cab and disbelieving the authenticity of a weapon held by the man who had struck him and seeing another cab, ran over to it (Tr. 35). The cab driver then sought assistance and found a squad car at 14th and C Streets and accompanied the police. The defendant was seen walking at 18th and C Streets aporoximately fifteen minutes after he had originally fled from his cab (Tr. 46, 55). A handkerchief found on defendant was identified by the cab driver as the handkerchief used to cover his face in the cab (Tr. 43, 44. 57, 58).

In cross examination of the defendant; the prosecutor alleged that in view of the defense of alibi "xx credibility is now crucial." He therefore requested permission to use a prior conviction of defendant for assault. (Tr. 71, 72) The Court gave its permission (Tr. 72) and the prior conviction was used (Tr. 72).

In cross examination of the defendant's sister who corroborated his alibi for the evening of November 25, 1966, the character of the witness was

attacked as follows by the prosecutor:

> "Q. Now Miss Green, on that night that you gave a party for -- By the way you had two illegitimate children. Were they by different people?
>
> A. No they were not.
>
> Q. The same man?
>
> A. Yes." (Tr. 83)

SUMMARY OF ARGUMENT

The Court below committed plain error by permitting the impeachment in cross examination of defendant by inquiry respecting a previous conviction of assault and by permitting, in cross examination, inquiry respecting the chastity of the sole corroborating defense witness. The conviction of defendant on Count One of the indictment was against the weight of the evidence. The Court below committed plain error by failing to instruct that proof of identity as to one of the two offenses charged in the indictment could not be considered as circumstantial evidence relating to the proof of identity in respect of the other offense.

ARGUMENT

I

THE COURT BELOW COMMITTED SUBSTANTIAL ERROR AND AN ABUSE OF DISCRETION IN PERMITTING THE IMPEACHMENT OF DEFENDANT BY INQUIRY RESPECTING A PRIOR CONVICTION FOR ASSAULT.

The prosecutor requested and obtained permission of the Court to use a conviction for assault in cross examining the defendant. (Indictment was for assault on a police officer but the conviction was for assault (Tr. 71)). Assault has no connection with credibility.

> "Acts of violence on the other hand which may result from a short temper, a combative nature, extreme provocation or other causes generally have little or no bearing on honesty and veracity. A 'rule of thumb' thus should be that convictions which rest on dishonest conduct relate to credibility whereas those of violent or assaultive crimes generally do not; * * *." Gordon v. U. S., U.S. App. D.C. 383 F 2d 936, 940.

> "While one who has recently been convicted of perjury might well be suspected of lying again under oath, the fact that a defendant accused of assault has already been convicted of assault has no such bearing on credibility." Brown v. U.S., 125 U.S. App. D.C. 220, 223.

The only conceivable function performed by the inquiry concerning the prior conviction for assault was to prove that defendant had a disposition to violent behavior which could stand as circumstantial evidence that he had committed the robbery and the assault with intent to commit robbery which were the subjects of the indictment.

> "Certainly the prior assault establishes a history of violent behavior but proof of violent behavior is inadmissible to prove assault. See Michelson v. U.S., 335 U.S. 465, 475-476, 69 S. Ct. 213, 93 L. ed. 168 (1948)." Brown v. U. S., supra, at 223.

Certainly under the rational evidentiary rule so established by Gordon, Brown and Michelson, the impeachment by use of prior conviction for assault was improper. The only questions are whether the introduction of the improper evidence effected a substantial prejudice to defendant and whether, in the light of failure of defense counsel to object, there exists plain error of which this Court may take notice.

The prejudice accomplished was manifest. The whole trial from call of case to return of jury verdict took only 3 hours and 28 minutes and every action taken in the short trial stands out in stark relief. The robbery of November 25, 1966, involved the defendant by identification by one witness through two acts of perception only, i.e., the sight that the complaining witness had at night of two men when he was backing up his cab to meet them and one occasion when he turned around during the course of driving. The defense was a corroborated alibi. Assuming arguendo that the verdict of the jury was not against the clear weight of the evidence on this count, the proof of violent behavior must have supplied the crucial tilt of balance in the mind of the jury. Although the identifying witness in the second count testified to somewhat greater opportunities to perceive, the same proof of violent disposition is here thrown into the balance as well.

The second phase of the problem, i.e., that plain error is involved, presents several surface difficulties. It is doubtless contemplated by rulings of this Court in Luck v. United States, 121 U.S. App. D.C. 151 and Gordon v. United States, supra, that defense counsel specifically raise objection and that the Trial Court take such steps as are necessary to balance the interest of testing the witnesses' credibility through impeachment by use of prior convictions against the substantive prejudice which may ensue. It is likewise clear that if the prior convictions

concern crimes which are crimen falsi having a valid relation to credibility like the larcenies, it is mandatory for defense counsel to bear the burden of demonstrating that prejudice outweighs the value of valid impeachment. Stevens v. United States, 125 U.S. App. D.C. 239, Walker v. United States, 124 U.S. App. D.C. 194. Furthermore, it is obvious that the Trial Judge must at least be informed of the crime for which defendant was previously convicted before an abuse of discretion may be charged. Hood v. United States, 125 U.S. App. D.C. 16.

In the instant case, however, as demonstrated by Brown and Gordon, the conviction used had no relationship to credibility and the prosecutor himself invoked and received specific permission of the Court to cross examine concerning it. (Tr. 71 and 72) At this point the Government had already rested its case in chief and the defendant had testified as to his alibi, so all of the facts showing the high prejudice were before the Court. Accordingly, the Trial Court, in the face of the relevant information to which defense counsel could have added nothing except the formality of an objection, did in fact exercise and abuse her discretion. Such an abuse constitutes plain error. Rule 52(b), Fed. R. Crim. P.

It is additionally submitted that Bostic v. United States, 68 App. D.C. 167, the old precedent for use of prior conviction for assault in impeachment which had little to recommend it at the outset (See Campbell v. United States, 85 U.S. App. D.C. 133, 135), must be considered as overruled sub silentio by Gordon and Brown at least in the context of a case like homicide or robbery where the proof of violent disposition will result in high prejudice.

II

THE CROSS EXAMINATION BY THE GOVERNMENT OF DEFENDANT'S SOLE CORROBORATING WITNESS RESPECTING UNCHASTITY CONSTITUTED PLAIN ERROR.

On cross examination of the witness, Iola Elaine Green, the prosecutor asked the following questions:

> "Q. Now, Miss Green, on that night that you gave a party for -- By the way, you had two illegitimate children. Were they by different people?
>
> A. No, they were not.
>
> Q. The same men?
>
> A. Yes." (Tr. 83)

Such inquiry respecting unchastity unrelated to the issues of the case is forbidden as a device of impeachment. This is the rule in a majority of American jurisdictions, 98 CJS Sec. 505, and is certainly the rule in the District of Columbia:

> "The government used as a corroborating witness one Lydia Ritter, who testified that she was present when the offense was committed. On cross-examination, she was asked: 'Have you been going around improperly and having intercourse for money?' The court properly sustained an objection to the question. The witness was fourteen years old, but appeared before the court as any other witness. Neither general reputation for unchastity nor particular acts could be used to impeach her evidence. She was subject only to the general rules of evidence relating to the method of impeachment, and the question was not directed to any rule with which we are familiar." Sacks v. United States, 41 App. D.C. 34, 36.

The witness furnished the only corroboration to defendant's alibi. Preservation of her character against improper attack was vital to fair disposition of the case for the same reason as that noted by this Honorable Court in Brown v. United States, 119 U.S. App. D.C. 203, 208:

"Since Belton's testimony exculpating appellant comprised a major portion of appellant's defense at trial, we cannot say it was harmless error to admit testimony for the purpose of showing 'criminal' nature on Belton's part in order to diminish his credibility as a witness."

III

THE VERDICT OF GUILTY ON COUNT ONE OF THE INDICTMENT IS AGAINST THE CLEAR WEIGHT OF EVIDENCE.

The identification of defendant by the cab driver Stiles as one of the persons who robbed him on November 25, 1967, is based upon two brief and inadequate night time glances (Tr. 16, 17 and 25). Defendant's alibi for the evening was corroborated and uncontradicted. The record does not support a finding that the guilty verdict was rationally consistent with the evidence. Douglas v. United States, 99 U.S. App. D.C. 232, 239, and a reasonable mind must have had reasonable doubt as to guilt. Farrar v. United States, 107 U.S. App. D.C. 204, 206.

IV

THE FAILURE OF THE COURT TO INSTRUCT THAT PROOF OF IDENTITY OF ONE OF THE TWO OFFENSES CHARGED COULD NOT BE USED AS CIRCUMSTANTIAL EVIDENCE OF IDENTITY RESPECTING THE OTHER OFFENSE, CONSTITUTED PLAIN ERROR.

The two offenses, the robbery on November 25, 1966, and the assault with intent to commit robbery on November 27, 1966, were joined in one indictment and proceeded to trial together. No motion for severance was made. The Trial Court gave no instruction respecting the confinement of proof of identity in one case strictly to the count which it concerned.

The Government, in argument, used the proof of each in support of the other under the theory of common design or plan. (Tr. 97) The issue accordingly becomes whether or not the cumulative proof of identity under the common design or plan theory was permissible in this case and, if not, whether it constituted plain error for the Court to fail to instruct precisely concerning the need to confine proof of identity as to each offense strictly to the count to which it pertained.

It is respectfully submitted that as in Drew v. United States, 118 U.S. App. D.C. 11, the common circumstances fit into an obvious tactical pattern rather than an identity of design. The basic differences between the instant case and Drew are that two men, not one, were involved, cabs and not ice cream stores were the objects of the robberies and that the cabs were told to go to the same area. It is also submitted that such distinctions are not material. The proof, accordingly, did not amount to evidence of common design or plan and should not have been permitted for that purpose, Gregory v. United States, 125 U.S. App. D.C. 140, and at a minimum the Court should have given the necessary instruction.

CONCLUSION

It is respectfully submitted that the conviction of appellant Green should be reversed.

Respectfully submitted,

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Attorney Appointed to
Appellant Clifford E. Green

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,519

CLIFFORD E. GREEN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
HAROLD H. TITUS, JR.,
CARL S. RAUH,
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Cr. No. 1477-66

QUESTION PRESENTED

In the opinion of appellee the following question is presented:

Do any of appellant's contentions raised for the first time on appeal amount to plain error affecting substantial rights?

INDEX

TABLE OF CASES

Cases—Continued — Page

OTHER REFERENCES

*Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,519

CLIFFORD E. GREEN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant Green was charged in a two-count indictment with robbery in violation of 22 D.C. CODE § 2901 (1967) (Count 1) and assault with intent to commit robbery in violation of 22 D.C. CODE § 501 (1967) (Count 2).[1] After

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[1] The indictment charges:

FIRST COUNT:

On or about November 25, 1966, within the District of Columbia, Clifford E. Green, by force and violence and against resistance and by putting in fear, stole and took from the person and from the immediate actual possession of Gordon J. Styles, property of Gordon J. Stiles, of the value of about

trial before a jury and District Judge Matthews on September 19 and 20, 1967, the jury returned a verdict of guilty as charged (Tr. 120). Appellant received a general sentence of 2 to 6 years imprisonment.

The Government's Case

The Government's evidence at trial overwhelmingly proved appellant guilty of robbing Gordon J. Stiles while Stiles was driving his cab during the night of November 25-26, 1966 (Count 1) and assaulting with intent to rob Charles C. Hines while Hines was driving his cab at midnight November 26-27, 1966 (Count 2). The Government's case consisted of the testimony of Gordon J. Stiles, Charles C. Hines and Private Charles J. Hersey (the arresting police officer), and the blue and red polka dot handkerchief found on appellant's person shortly after his arrest.

The testimony of Gordon J. Stiles

Gordon J. Stiles, the complainant in the Count 1 robbery charge, was employed as a postal carrier; he also worked part-time as a cab driver (Tr. 14). Stiles had been a postal carrier for eleven years and a part-time cab driver for six years (Tr. 14). On the night of November 25, 1966, Stiles began driving his taxicab at 7:00 or 8:00 p.m. (Tr. 15). Sometime later on this same night,[2] Stiles was flagged down by two men standing on

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$23.25, consisting of $20.00 in money, one wallet of the value of $3.00 and nine keys of the value of $0.25.

SECOND COUNT:

On or about November 27, 1966, within the District of Columbia, Clifford E. Green, feloniously and wilfully assaulted Charles C. Hines, with intent by force and violence and against resistance and by putting in fear, to steal and take valuable goods and property from the person and from the immediate actual possession of the said Charles C. Hines.

[2] In his opening statement, Government counsel stated that the robbery of Stiles occurred at about 11:45 p.m. on November 25, 1966 (Tr. 6). Apparently, because of an oversight, neither Government counsel, defense counsel nor the trial judge elicited from Stiles the exact time of the robbery on the night of November 25, 1966.

the bridge at East Capitol Street and Minnesota Avenue;[3] he stopped his cab a short distance in front of the two men and then backed up his cab (Tr. 15-17, 27). The two men walked forward towards the cab and "before they got into it [Stiles] observed them closely" and "got a good look at them" (Tr. 17, 27). Stiles, whose "eyesight is perfect," observed the faces of both men under a street light before they entered his cab; Stiles always looked at his passengers before they entered his cab (Tr. 17, 24-25, 27). The two men got into the back seat of the cab (Tr. 16). Stiles observed both men as they entered his cab; the inside cab light was on (Tr. 17, 25). Appellant sat on the right side and his companion sat on the left side (Tr. 16-18). Stiles had no doubt "whatsoever" that Appellant Green was the man who sat in the right rear seat of his cab (Tr. 25). He unequivocally identified appellant in court as this man (Tr. 17-18). Stiles "got a good look at" appellant before and during his entry into the cab and once while appellant was in the back seat (Tr. 17, 24-25, 27). Appellant's companion was described by Stiles as a Negro male, tall and wiry, weighing approximately 190 pounds (Tr. 25-26). Stiles stated that he would be able to identify appellant's companion if he saw him again (Tr. 26).

Stiles was directed by his two passengers to drive to 18th and D Streets, Northeast, which he did (Tr. 16). Midway between C and D Streets on 18th Street, Northeast, Stiles was told to stop so that his passengers could alight (Tr. 16, 18). When Stiles stopped his cab, ap-

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[3] Stiles answered in the affirmative when asked whether he picked up some passengers during the night of November 25, 1966 in the area of East Capitol Street and Minnesota Avenue (Tr. 15). However, on two subsequent occasions in the transcript, the transcript shows that Stiles picked up the two robbers at South Capitol Street and Minnesota Avenue (Tr. 15-16, 27). These two references to South Capitol Street represent either an error in reporting and transcribing or a misstatement by Stiles. A street map of the District of Columbia reveals that South Capitol Street is not anywhere near Minnesota Avenue and does not intersect Minnesota Aveune. Furthermore, there is testimony that Stiles passed by the ball park which is right at East Capitol Street (Tr. 16).

pellant's companion, who was sitting directly behind Stiles, struck Stiles with a pistol on the right side of the head (Tr. 16-17, 18-19). Stiles was told "to turn the key off and turn the lights off and set the brakes," which he did (Tr. 19). Appellant, who did "nearly all the talking," then ordered Stiles to place his wallet and any other money he had on the seat; Stiles placed his wallet and some bills from his shirt pocket on the seat (Tr. 21, 23). Stiles was next ordered to start "this MF cab up" and drive it according to instructions or he would be shot (Tr. 19). The pistol was placed "directly at the base of [Stiles'] head" (Tr. 19). He was told not to exceed 25 miles-per-hour, to use his signal light and to stop at all stop signs, and was warned that "if you try anything I am going to kill you" (Tr. 19).

Stiles was directed back to the area of East Capitol Street and Minnesota Avenue, and from there he was directed to a street "with a barricade" that "is dark and wooded" (Tr. 20). Stiles was ordered to stop the car here and told to lay on the floor of the cab (Tr. 21). As he proceeded to lay on the floor, change in his change purse started to jingle (Tr. 21). Appellant told Stiles, "MF, you have got some more money. Give me that money or I will kick your head off . . ." (Tr. 21). Stiles gave appellant the change (Tr. 21). Stiles was finally ordered to keep his head down for five minutes, and appellant and his companion fled with Stiles' wallet containing ten dollars, eight dollars from Stiles' shirt pocket, two dollars worth of change and Stiles' keys (Tr. 22-23). The total amount of money taken was approximately $20 (Tr. 23). Stiles immediately went to the fourteenth precinct of the Metropolitan Police Department and reported the robbery (Tr. 23). Two days later Stiles saw Appellant Green who was in the custody of the police (Tr. 23-24).

The testimony of Charles C. Hines

Charles C. Hines, the complainant in the Count 2 assault with intent to commit robbery charge, was employed

as a guard at the Treasury Department; he also worked part-time as a cab driver (Tr. 30-31). Hines had been a guard at the Treasury Department for 13 months; prior to that time, he had worked as a guard at the Children's Center in Laurel, Maryland; Hines had been a part-time cab driver for about six years (Tr. 30-31). Hines was driving his cab on the night of November 26-27, 1966 (Tr. 31). Around midnight on this night, he was hailed by two men at East Capitol Street and Minnesota Avenue (Tr. 32). Hines stopped his cab and the two men got in the back seat of the cab (Tr. 32-33). Hines observed both men as they entered his cab; the overhead light was on inside his cab (Tr. 34, 42, 45). Appellant, who was one of these men, sat in the right rear seat of the cab (Tr. 33, 38-39). In court, Hines unequivocally identified appellant as the man who was seated in the right rear seat of his cab (Tr. 38-39). Hines had observed the facial features of appellant on four occasions that night (Tr. 42). Appellant's companion sat in the left rear seat of the cab which was directly behind the driver's seat (Tr. 32-33). Hines described appellant's companion as a tall, dark-skinned male, about 6′4″, very thin, weighing about 170 or 180 pounds (Tr. 46). Hines stated that he would recognize appellant's companion if he saw him again (Tr. 46).

Hines was told by his passengers to take them to 18th and C Streets, Northeast, which he did (Tr. 33). During the ride to 18th and C Streets, Northeast, appellant asked Hines for a cigarette; Hines turned around, looked at appellant and handed him a cigarette (Tr. 33-34, 42). Appellant then asked Hines for a match; Hines gave appellant his cigarette lighter to use (Tr. 34). When appellant handed the lighter back, Hines turned around and saw appellant "putting a blue and red polka dot handkerchief in front of his face" with his left hand (Tr. 34-35, 36). Hines was ordered to stop the car, which he did; the cab came to a stop in the 300 block of 18th Street, Northeast, which apparently is between C and D Streets (Tr. 34, 49, 54). When Hines stopped his cab, appellant's

companion, who was sitting directly behind Hines, struck Hines on the right side of his head with a pistol, and said, "(T)his is a stickup" (Tr. 34-35, 49).

Hines jumped out of the cab and ran over to another cab that had pulled up down the street (Tr. 35). Both appellant and his companion alighted from the cab and fled (Tr. 35, 40, 51-52). Hines then went back to his cab and sought out a policeman (Tr. 40). He found Officer Hersey at 14th and C Streets, Northeast, investigating an accident and reported the assault with intent to commit robbery to Officer Hersey (Tr. 40). Hines was then taken in a scout car by Officer Hersey and his partner to look for the two robbers (Tr. 40, 41). As they drove around the area near the scene of the crime, Hines gave the police a description of the two men (Tr. 41). At this time, one of the officers pointed out a man walking at 18th Place and C Street, Northeast; Hines was asked whether this man looked like one of the robbers, and Hines replied that "that is him" (Tr. 41). This man, Appellant Green, was placed under arrest at this time (Tr. 42). The arrest of appellant and the identification by Hines took place approximately fifteen minutes after the crime had occurred (Tr. 41, 46). Appellant was handcuffed and transported to the ninth precinct in the scout car (Tr. 43). Hines rode along with appellant and the police officers to the precinct (Tr. 43). During the ride to the precinct, Hines mentioned that appellant had put a handkerchief to his face with his left hand just before the assault (Tr. 43). At the precinct station, Hines described the handkerchief as a blue and red polka dot handkerchief (Tr. 44). Officer Hersey then reached into appellant's left pocket and pulled out the blue and red polka dot handkerchief that Hines had described (Tr. 44). Hines identified the handkerchief in court and it was admitted into evidence (Tr. 37-38, 44-45).

The testimony of Private Charles J. Hersey

Private Charles J. Hersey, Ninth Precinct, Metropolitan Police Department, was working the early morning

hours of November 27, 1966, assigned to a scout car with his partner, Private James R. Jenkins (Tr. 53). Around 12:25 a.m. on November 27, 1966, Officers Hersey and Jenkins were investigating a minor automobile accident at 14th and C Streets, Northeast (Tr. 54). At this time, Charles C. Hines drove up in his cab and told Officer Hersey that two men had just tried to rob him at 18th and D Streets, Northeast (Tr. 54). Hines got in the back seat of the scout car and the two officers and Hines proceeded to the general area of the crime to look for the two robbers (Tr. 54). At 18th Place and C Street, Northeast, Officer Hersey pointed out a man walking and Hines said that he looked like one of the men (Tr. 54-55). Officer Hersey and Hines started to get out of the car and at this time, Hines stated that "that is the man" (Tr. 55-56). As Officer Hersey and Hines alighted from the car this man stopped and threw his hands up in the air; neither Officer Hersey nor his partner had his service revolver drawn (Tr. 56). This man was placed under arrest (Tr. 56). This man, who Hines had identified and Officer Hersey had arrested, was Appellant Green (Tr. 55).

Appellant was patted down for a weapon but none was found (Tr. 56). Appellant was then handcuffed, placed in the scout car and transported to the precinct (Tr. 56-57). On the way to the precinct, Hines told Officer Hersey about the handkerchief that appellant had (Tr. 57). He decribed it as a blue and red polka dot handkerchief (Tr. 57). Hines also told Officer Hersey that appellant had held this handkerchief up to his face with his left hand (Tr. 58). At the precinct, Officer Hersey reached into appellant's left coat pocket and pulled out a blue and red polka dot handkerchief which matched the description Hines had given (Tr. 58). Officer Hersey had not seen the handkerchief prior to the time Hines told him about it (Tr. 57). In court, Officer Hersey identified the blue and red polka dot handkerchief that had been admitted into evidence as the handkerchief that he had taken from appellant's left coat pocket (Tr. 58-59).

On the basis of the testimony of Gordon J. Stiles, Charles C. Hines, Private Charles J. Hersey and the admission into evidence of the blue and red polka dot handkerchief, the Government rested (Tr. 59). Appellant did not make a motion for judgment of acquittal (Tr. 66).

Appellant's Defense

The testimony of Appellant Green

Appellant, before he testified, made no request of the trial court to exclude prior convictions. Appellant's defense to the robbery of Stiles was alibi; he claimed he was home during the time of this robbery helping his sister give a party for her son. Appellant's defense to the assault with intent to rob Hines was both alibi and innocent presence near the scene of the crime; he claimed that he was at a party at the time of the crime and that he was walking home from the party near the scene of the crime when he was arrested by the police.

Appellant Clifford E. Green lived at 4120 East Capitol Street in the District of Columbia (Tr. 67). Appellant denied robbing Stiles on the night of November 25-26, 1966 (Tr. 67). He claimed that he was at his home on the night of November 25-26, 1966 helping his sister give a party for her teenage son (Tr. 67-68). The party lasted from 7:30 to 11:30 p.m. on November 25, 1966; after the party ended, appellant helped straighten up (Tr. 68). Appellant claimed that he went to bed about 1:30 or 2:00 a.m. on November 26, 1966 and that he had not left his house from the time the party started until he went to bed (Tr. 67-68).

Appellant also denied assaulting with intent to rob Hines on the night of November 26-27, 1966 (Tr. 68). Appellant claimed that he was attending a party given by his friend, Abraham Johnson, in the 1500 block of Isherwood Street, Northeast, on the night of November 26-27, 1966 (Tr. 69). Appellant arrived at this party at approximately 10:30 p.m. on November 26, 1966 (Tr. 69). The party was "a social get-together"; "all of our school friends were there, you know, and it was quite a crowd" (Tr. 69). Appellant claimed that he left the party about midnight and began walking the three miles to his home when he was arrested at 18th and D Streets, Northeast (Tr. 69-70).

Prior to cross-examining appellant, Government counsel approached the bench and requested the court's permission to impeach appellant with a 1965 assault conviction which grew out of an assault on a police officer (Tr. 71). Appellant did not object to the Government impeaching him with this prior conviction (Tr. 71-72). The court then granted the Government's request and appellant was impeached by the Government with this prior conviction (Tr. 72).[4]

On cross-examination, appellant was primarily questioned about the night of November 26-27, 1966. Appellant stated that in the latter part of December 1966 he had spoken with Abraham Johnson about being a witness (Tr. 75-77). However, appellant had not spoken to him since December 1966 and did not know the present whereabouts of Abraham Johnson because he had moved from the 1500 block of Isherwood Street, Northeast (Tr. 74-77).

When appellant was questioned who else was at the party, he replied, "A lot of friends" (Tr. 77). He was unable, however, to give the full name of any of these friends except Abraham Johnson and his wife, Caroline

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[4] Neither Government counsel nor defense counsel mentioned the prior conviction in closing argument (Tr. 96-106). In addition, a cautionary instruction on prior convictions was given by the trial court (Tr. 110).

Johnson, and told Government counsel, "Am I supposed to know everybody at a party, sir?" (Tr. 77-78).

Appellant did admit that he did not have any money with him when he was arrested (Tr. 78-79). He claimed, however, that he was employed as a porter in a southwest Washington building (Tr. 79). But when asked who his employer was that paid him his salary, appellant replied, "Oh, I can't think of his name offhand" (Tr. 79-80).

The testimony of Iola Elaine Green

Miss Iola Elaine Green, the sister of appellant, lived at 4120 East Capitol Street in the District of Columbia with her mother, father and brother, and her two children (Tr. 80-81). She testified on direct examination that she was single and had two children (Tr. 80-81).

On November 25, 1966, Miss Green gave a birthday party for her 13-year-old son, Elwood Darnell Green; approximately 30 children attended (Tr. 81). The party lasted from 7:30 to 11:30 p.m. on November 25, 1966 and Miss Green claimed that appellant was there the whole time as a chaperone (Tr. 81-82). After the party was over, Miss Green claimed that appellant helped her clean up, and after talking for a while, they went to bed at 1:00 or 1:30 a.m. on November 26, 1966 (Tr. 82). She claimed appellant did not leave the house from the time the party began until he went to bed.

On cross-examination, Government counsel asked Miss Green if her two illegitimate children were by the same man (Tr. 83). Miss Green answered in the affirmative (Tr. 83). Miss Green was also asked who the father was and whether he was at the birthday party (Tr. 88-89). Miss Green responded that the father's name was Hermann Marshall, Jr. and that he was not at the birthday party (Tr. 89). Miss Green was also asked who were some of the parents at the birthday party (Tr. 83-84). Miss Green gave the name and addresses of three of her friends who were at her party and stated that she could locate all of them (Tr. 84-85).

After the testimony of appellant and his sister, the defense rested (Tr. 93). The Government produced no rebuttal witnesses (Tr. 93). Appellant did not make a motion for judgment of acquittal (Tr. 93-95).

The court then inquired whether either the Government or appellant had "any special instructions" (Tr. 94). Appellant, through his attorney, stated, "I have none, Your Honor" (Tr. 94). After closing arguments by counsel, the court thoroughly instructed the jury (Tr. 96-106, 107-118). No instruction was given charging the jury that they could not consider the evidence in one count to support the identity of appellant as the assailant in the other count. After instructing the jury, the court inquired of counsel, "Are there any objections or requests?" (Tr. 118). Appellant, through his attorney, replied in the negative (Tr. 118).

The jury retired to deliberate at 2:20 p.m. on September 20, 1967 (Tr. 118). At 3:00 p.m. on September 20, 1967, the jury returned a verdict of guilty as charged (Tr. 120).

STATUTES AND RULES INVOLVED

Title 22, District of Columbia Code, Section 501, provides in pertinent part:

> Every person convicted of any assault with intent . . . to commit robbery . . . shall be sentenced to imprisonment for not more than fifteen years.

Title 22, District of Columbia Code, Section 2901, provides:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months [amended December 27, 1967 to provide for a "two year" minimum] nor more than fifteen years.

Rule 30, Federal Rules of Criminal Procedure, provides in pertinent part:

> . . . . No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. . . .

Rule 52, Federal Rules of Criminal Procedure, provides:

> (a) *Harmless Error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
>
> (b) *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

SUMMARY OF ARGUMENT

None of appellant's contentions raised for the first time on appeal amount to plain error affecting substantial rights.

(A)

This court need not reach the issue of the sufficiency of the Government's evidence on Count 1, since even if resolved in appellant's favor, it would not affect the sentence to be served. Appell ant received a general sentence to cover both Counts 1 and 2 which was less than the maximum sentence possible under either count. Therefore, the judgment below must be affirmed since the sufficiency of the Government's evidence as to Count 2 is sustainable. *Barenblatt* v. *United States*, 360 U.S. 109, 115 (1959) ; *Kosmos* v. *United States*, 111 U.S. App. D.C. 234, 296 F.2d 356 (1961).

In any event, the Government's evidence on Count 1 was sufficient. The complaintant in Count 1, who has perfect eyesight, got a good look at appellant and observed him closely under a street light. He also observed appellant on another occasion. He was positive appellant was one of the robbers. This testimony is

sufficient to sustain the robbery conviction. *Jones* v. *United States*, 124 U.S. App. D.C. 83, 361 F.2d 537 (1966); *Thompson* v. *United States*, 88 U.S. App. D.C. 235, 188 F.2d 652 (1951). There was also corroboration of the complaintant's identification.

(B)

The trial judge did not commit prejudicial error, let alone plain error, by failing to instruct the jury that they could not consider the evidence on one count to support the identity of appellant as the assailant in the other count. The offenses charged in Counts 1 and 2 were perpetrated in an extraordinarily similar manner. Therefore, it was proper for the jury to consider the evidence on one count to support the identity of appellant as the assailant in the other count. *Drew* v. *United States*, 118 U.S. App. D.C. 11, 15-16, 331 F.2d 85, 89-90 (1964); *People* v. *Peete*, 28 Cal. 2d 306, 169 P.2d 924, *cert. denied*, 329 U.S. 790 (1946) (Traynor, J.).

(C)

The impeachment of appellant with one 1965 assault conviction, which arose out of an assault on a police officer, was not prejudicial error, let alone plain error. Appellant did not request the court to exclude his assault conviction nor did he object when the Government requested permission to impeach him with this assault conviction. In addition, the court gave the customary cautionary instruction on prior convictions. Furthermore, Government counsel never mentioned the prior conviction in closing argument. Under these circumstances, this Court has held there is not plain error affecting substantial rights. *Walker* v. *United States*, 124 U.S. App. D.C. 194, 363 F.2d 681 (1966), *cert. denied*, 386 U.S. 922 (1967).

(D)

One question by Government counsel during cross-examination of appellant's alibi witness (who was also

appellant's sister) was not improper impeachment, let alone plain error. The alibi witness testified on direct examination that she had two illegitimate children. Government counsel on cross-examination asked the witness if these children were fathered by the same man. Appellant interposed no objection to this question. The alibi witness replied that her children were fathered by the same man. Since the question and answer helped the testimony of the alibi witness, appellant cannot claim that he was prejudiced.

ARGUMENT

None of appellant's contentions raised for the first time on appeal amount to error, let alone plain error affecting substantial rights.

(Tr. 17, 24-25, 27, 66, 71-72, 80-83, 88-89, 93-106, 110, 118)

(A)

Appellant contends[5] that the Government's evidence was insufficient to sustain the jury's verdict of guilty on Count 1 (robbery of Stiles) because the identification of appellant as one of the robbers was based on the uncorroborated identification of the complainant who did not have an adequate opportunity to observe the robbers.[6] Appellant does not contest the sufficiency of the Government's evidence on Count 2 (assault with intent to rob Hines). Our position is that this Court should not reach the issue of the sufficiency of the Government's evidence on Count 1, since even if resolved in appellant's favor, it would not affect the sentence to be served. In any event, we believe that the Government's evidence in support of Count 1 was ample to sustain the jury's verdict of guilty.

The law is clear that where a defendant is convicted of more than one count and receives a general sentence,

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[5] Brief for Appellant, p. 9.

[6] Appellant made no motions for judgment of acquittal at trial (Tr. 66, 93-95).

which is not greater than the maximum sentence possible under any one of the counts, the judgment of the trial court will be upheld if the conviction upon any of the counts is sustainable. *Barenblatt* v. *United States*, 360 U.S. 109, 115 (1959); *Kosmos* v. *United States*, 111 U.S. App. D.C. 234, 296 F.2d 356 (1961). *Cf. Hirabayashi* v. *United States*, 320 U.S. 81, 85 (1943); *Fabianich* v. *United States*, 112 U.S. App. D.C. 319, 302 F.2d 904, *cert. denied*, 371 U.S. 816 (1962); *Gibson* v. *United States*, 106 U.S. App. D.C. 10, 13, 268 F.2d 586, 589 (1959); *Robinson* v. *United States*, 93 U.S. App. D.C. 347, 349, 210 F.2d 29, 32 (1954). In the instant case, appellant received a general sentence of 2 to 6 years imprisonment to cover both Count 1 and Count 2. The maximum sentence that could have been imposed under Count 1 (robbery) was 15 years imprisonment; the maximum sentence that could have been imposed under Count 2 (assault with intent to commit robbery) was also 15 years imprisonment. Since it is conceded that the Count 2 conviction is based on sufficient evidence and since the general sentence imposed for Count 1 and Count 2 was less than the maximum sentence that could have been imposed under either count, the judgment of the court below will not be overturned by a finding that the Government's evidence was insufficient to sustain Count 1. Therefore, there is no reason for this Court to consider the sufficiency of the Government's evidence on Count 1.

In any event, the Government's evidence in support of Count 1 was clearly sufficient. The complainant's identification of appellant was based on an adequate opportunity to observe. The complainant, Gordon J. Stiles, who had "perfect" "eyesight," "got a good look at" appellant and his companion and "observed them closely" under a street light just before they entered his cab; Stiles also observed appellant once more when he was in the back seat of the cab (Tr. 17, 24-25, 27). Stiles, who was an exceptionally credible witness, was positive that appellant was one of the robbers, and his identification of appellant was not impeached (Tr. 25). Under these circumstances, the Government's evidence was sufficient to sustain the verdict of guilty on Count 1. The law is clear that the

uncorroborated identification by the complainant of the robber is sufficient to sustain a robbery conviction. *Jones* v. *United States*, 124 U.S. App. D.C. 83, 361 F.2d 537 (1966); *Thompson* v. *United States*, 88 U.S. App. D.C. 235, 188 F.2d 652 (1951). *Cf. Thomas* v. *United States*, No. 20,287, D.C. Cir., May 4, 1967. Of course, in the case at bar, the complainant's identification of appellant in Count 1 was substantially corroborated by the Government's evidence in Count 2. As will be discussed fully in Argument I(B), it was proper for the jury to consider the evidence produced by the Government for Count 2 to support the identity of appellant as the robber in Count 1. *Drew* v. *United States*, 118 U.S. App. D.C. 11, 16, 331 F.2d 85, 90 (1964).

(B)

Appellant contends that the trial judge committed prejudicial error in failing to instruct the jury that they could not consider the Government's evidence related to one count to support the identity of appellant as the assailant in the other count.[7] Appellant never requested the trial judge to give such an instruction (Tr. 94, 118). Before instructing the jury, the trial judge inquired whether there were "any special instructions," and appellant, through his attorney, replied, "I have none, Your Honor" (Tr. 94). After the trial judge had instructed the jury, she inquired, "Are there any objections or requests?" and appellant, through his counsel, replied, "No, Your Honor" (Tr. 118). The Government's position is that since appellant was given an adequate opportunity below to request instructions and did not do so, he should be precluded on appeal from claiming that a certain instruction should have been given. Furthermore, we believe that it would have been improper for the trial judge to instruct the jury that they could not consider the Government's evidence related to one count to support the identity of appellant as the assailant in the other count.

[7] Brief for Appellant, pp. 9-10.

Under the facts in this case, it was proper for the jury to consider the Government's evidence related to one count to support the identity of the appellant as the assailant in the other count.

Appellant's trial counsel, who was in the best position to evaluate the need for the jury to be given certain instructions, did not request that the trial judge give any special or additional instructions. Therefore, appellant should be precluded on appeal from claiming that the jury should have been charged not to consider the Government's evidence on one count to support the identity of appellant as the assailant in the other count, since clearly the absence of this instruction did not amount to plain error affecting substantial rights of appellant. FED. R. CRIM. P. 30; *Kelly* v. *United States*, 124 U.S. App. D.C. 44, 361 F.2d 61 (1966); *Robertson* v. *United States*, 124 U.S. App. D.C. 309, 364 F.2d 702 (1966); *Williams* v. *United States*, 116 U.S. App. D.C. 131, 321 F.2d 744, *cert. denied*, 375 U.S. 898 (1963); *Villaroman* v. *United States*, 87 U.S. App. D.C. 240, 184 F.2d 261 (1950).

In any event, it was proper for the jury to consider the Government's evidence on one count to support the identity of appellant as the assailant in the other count. *Drew* v. *United States*, 118 U.S. App. D.C. 11, 15-16, 331 F.2d 85, 89-90 (1964); *People* v. *Peete*, 28 Cal.2d 306, 169 P.2d 924, *cert. denied*, 329 U.S. 790 (1946) (Traynor, J.).[8] In *Drew*, Judge McGowan, speaking for this Court, stated:

> Evidence of other crimes is admissible when relevant to (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan

[8] In the famous "brides of the bath" case, the defendant was accused of murdering his wife, who had left her property to him by will, by drowning her in the bathtub. It was held proper to show that the defendant had previously married several wives, who left him their property and were discovered drowned in the bath. *R.* v. *George Joseph Smith* (1915) reported in NOTABLE BRITISH TRIALS (1922), and described in MARJORIBANKS, FOR THE DEFENCE: THE LIFE OF EDWARD MARSHALL HALL, at 321 (1937), and footnoted in MCCORMICK, EVIDENCE § 157, at 328 n.6 (1954).

> embracing the commission of two or more crimes so related to each other that proof of the one tends to establish the other, and (5) the identity of the person charged with the commission of the crime on trial. When the evidence is relevant and important to one of these five issues, it is generally conceded that the prejudicial effect may be outweighed by the probative value.
>
> If, then, under the rules relating to other crimes, the evidence of each of the crimes on trial would be admissible in a separate trial for the other, the possibility of "criminal propensity" prejudice would be in no way enlarged by the fact of joinder. . . . *Similarly, if the facts surrounding the two or more crimes on trial show that there is a reasonable probability that the same person committed both crimes due to the concurrence of unusual and distinctive facts relating to the manner in which the crimes were committed, the evidence of one would be admissible in the trial of the other to prove identity.* In such cases the prejudice that might result from the jury's hearing the evidence of the other crime in a joint trial would be no different from that possible in separate trials. 118 U.S. App. D.C. at 16, 331 F.2d at 90. (Emphasis added.)

In the case at bar, the evidence in support of Count 1 and Count 2 show a "concurrence of unusual and distinctive facts relating to the manner in which the crimes were committed." 118 U.S. App. D.C. at 16, 331 F.2d at 90. Therefore, "there is a reasonable probability that the same person committed both crimes" and "the evidence of one would be admissible in the trial of the other to prove identity." 118 U.S. App. D.C. at 16, 331 F.2d at 90.

The chart below emphasizes the phenomenal similarity in the manner in which the offenses charged in Count 1 and Count 2 were perpetrated.

Count 1	Count 2
1. Robbery of Gordon J. Stiles.	1. Assault with intent to rob Charles C. Hines.
2. Night of November 25-26, 1966.	2. Night of November 26-27, 1966.
3. Appellant and his companion hailed Stiles' cab at East Capitol Street and Minnesota Avenue.	3. Appellant and his companion hailed Hines' cab at East Capitol Street and Minnesota Avenue.
4. Appellant sat in the right rear seat and his companion sat in the left rear seat.	4. Appellant sat in the right rear seat and his companion sat in the left rear seat.
5. Appellant was positively identified by Stiles.	5. Appellant was positively identified by Hines.
6. Appellant's companion was a tall and wiry Negro male, weighing approximately 190 pounds.	6. Appellant's companion was a tall and very thin, dark-skinned male, about 6'4" and 170 or 180 pounds.
7. Appellant and his companion told Stiles to take them to 18th and D Streets, Northeast, which he did.	7. Appellant and his companion told Hines to take them to 18th and C Streets, Northeast, which he did.
8. Stiles was told to stop his cab between C and D Streets on 18th Street, Northeast.	8. Hines was told to stop his cab between C and D Streets on 18th Street, Northeast.
9. When Stiles stopped his cab, appellant's companion, who was sitting directly behind Stiles, struck Stiles on the right side of his head with a pistol.	9. When Hines stopped his cab, appellant's companion, who was sitting directly behind Hines, struck Hines on the right side of his head with a pistol.
10. Stiles was forced to turn over his money to appellant and his companion.	10. Hines was told that "this is a stickup," but rather than give appellant and his companion any money, Hines jumped from his cab and ran.

In light of these similarities which are "so unusual and distinctive as to be like a signature,"[9] there is little doubt that the persons who committed the robbery of Stiles also committed the assault with intent to rob Hines. Therefore, it was proper for the jury to consider the evidence on one count to prove identity in the other count. The instruction that appellant claims should have been given would have charged just the opposite and would have been an incorrect statement of the law as applied to the instant case.

(C)

Appellant contends that it was prejudicial error for the trial judge to allow Government counsel to impeach him at trial with a 1965 assault conviction.[10] We believe that since appellant did not request the trial judge to exclude the assault conviction and since appellant did not object when the Government requested permission to use the assault conviction, he is in no position to complain on appeal. Furthermore, after appellant was impeached on cross-examination, his prior assault conviction was not mentioned again at trial, and the trial judge gave the customary cautionary instruction on prior convictions.

In order for appellant to claim on appeal that the trial judge abused his discretion under *Luck* v. *United States*, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965), he must object at trial to being impeached with prior convictions as well as meaningfully invoke the trial judge's discretion. *Lewis* v. *United States*, No. 21,083, D.C. Cir., February 13, 1968; *Gordon* v. *United States*, —— U.S. App. D.C. ——, 383 F.2d 936 (1967); *Stevens* v. *United States*, 125 U.S. App. D.C. 239, 370 F.2d 485 (1966); *Hood* v. *United States*, 125 U.S. App. D.C. 16, 365 F.2d 949 (1966); *Walker* v. *United States*, 124 U.S. App. D.C. 194, 363 F.2d 681 (1966), *cert. denied*, 386 U.S. 922 (1967). In the instant case, appellant did not invoke the

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[9] McCORMICK, EVIDENCE § 157, at 328 (1954).

[10] Brief for Appellant, pp. 5-7.

trial judge's discretion under *Luck* nor did appellant object to being impeached with a prior assault conviction.

In *Walker* v. *United States*, 124 U.S. App. D.C. 194, 363 F.2d 681 (1966), *cert. denied*, 386 U.S. 922 (1967) (Wright, McGowan and Leventhal, JJ.), this Court stated *per curiam*:

> In this appeal from a jury conviction of housebreaking, housebreaking while armed with a weapon, assault with a dangerous weapon, and carrying a dangerous weapon, only one reason is advanced for reversal. It is that the trial court abused its discretion—to the point of plain error within the meaning of Rule 52(b), FED.R.CRIM.P.—by permitting the prosecution to bring out on cross-examination of appellant a prior conviction for the last of these offenses [carrying a dangerous weapon].
>
> It may well be true, as appellant argues, that this prior conviction played some part in shaping the jury's conclusions. The question of whether the gun in the case belonged to the complaining witness or to appellant was contested at length in the testimony, and presumably occupied a central place in the jury's view of the whole case. But that this was likely to happen must have been evident in advance, and yet the defense made no effort, before appellant took the witness stand, to raise with the trial court the question of whether this prior conviction should be kept out in order to assure the availability to the jury of the accused's version of the events in dispute. See Luck v. United States, 121 U.S.App.D.C. 151, 348 F.2d 763 (1965). And even when the prosecutor, with commendable sensitivity to the significance of the matter, interrupted his cross-examination for the purpose of approaching the bench to inform the court and defense counsel that he was about to ask about the prior convictions, no objection of any kind was made. The usual instruction was given to the jury to confine its consideration of the prior convictions to the issue of credibility; and the closing argument of the Government to the jury was devoid of refer-

> ence to them. Under these circumstances, we are not disposed to characterize as plain error an alleged abuse of a discretion which was never invoked. 124 U.S. App. D.C. at 194-95, 363 F.2d at 681-82.[11]

The same factors which caused this Court not to find plain error in *Walker* are present in the case at bar. (1) Appellant made no effort, before he took the witness stand, to raise with the trial judge the question whether his prior assault conviction should be admitted for impeachment purposes. (2) Before cross-examining appellant, Government counsel requested the trial judge's permission to impeach appellant with a prior assault conviction which involved an assault on a police officer; appellant interposed no objection to this request (Tr. 71-72). (3) The customary charge was given the jury instructing them to confine their consideration of the prior conviction to the issue of credibility (Tr. 110). (4) Neither Government counsel nor appellant's trial counsel referred to appellant's prior conviction in closing argument (Tr. 96-106). Thus, the case at bar is controlled by *Walker*, and there is no plain error affecting substantial rights of appellant. This is especially so since the impeachment of appellant with one prior conviction was an insignificant part of the trial and did not prejudice appellant.[12]

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[11] Judge Fahy in his dissent in *Stevens* v. *United States*, 125 U.S. App. D.C. 239, 240, 370 F.2d 485, 486 (1966) expressed his agreement with the *Walker* case.

[12] Appellant, in his brief, has dwelled on the statement of this Court in *Gordon* v. *United States*, —— U.S. App. D.C. ——, ——, 383 F.2d 936, 940 (1967) that "a 'rule of thumb' thus should be that convictions which rest on dishonest conduct relate to credibility whereas those of violent or assaultive crimes *generally* do not." (Emphasis added.) We note that this Court in *Gordon* did not set out ironclad rules but rather guidelines to help the District Court exercise its discretion. The fact that assaults *generally* do not relate to credibility does not mean that assaults *never* can relate to credibility. Where as here, the assault conviction involved an assault on a police officer, we believe it does relate to credibility. One who assaults a police officer shows his complete lack of respect for the law and legal institutions. Such a person is less likely to feel duty bound to tell the truth in court than the average, law-abiding citizen.

(D)

Miss Iola Elaine Green, appellant's sister and alibi witness for the night of November 25-26, 1966, testified on direct examination that she was single and had two children (Tr. 80-81). She testified further that on the night of November 25, 1966 she had a birthday party for her teenage son and appellant was present from 7:30 p.m. on November 25, 1966 until 1:30 a.m. on November 26, 1966 (Tr. 81-82). On cross-examination, Government counsel asked Miss Green *inter alia* whether her two illegitimate children were by different men or the same man (Tr. 83). Appellant did not object to this question at trial. However, now on appeal appellant does object to this question contending that it was improper impeachment of Miss Green.[13] We think it is a little late for appellant to object.

Miss Green testified on direct examination that she had two illegitimate children. Therefore, the Government was not responsible for this fact being brought out before the jury, and appellant cannot honestly contend that Government counsel by asking the now objected question committed plain error affecting substantial rights of appellant. Actually, appellant should be glad Government counsel asked this question since Miss Green's answer put before the jury the information that her children were fathered by one man (Tr. 83). This certainly helped Miss Green's testimony.

Government counsel followed through in his cross-examination of Miss Green by asking her who the father was and whether he was at the party (Tr. 88-89). Clearly, this unobjected line of inquiry was well within the proper scope of cross-examination, and appellant was not prejudiced by this line of inquiry. For all these reasons, there certainly was no plain error affecting substantial rights of appellant.

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[13] Brief for Appellant, pp. 8-9.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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